

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

WASHINGTON, DC

ORDER NO. 5328

IN THE MATTER OF:

Served May 8, 1998

Promulgation of Revised Application)
Forms and Award of Incidental)
Authority)

Case No. MP-98-39

By this order the Commission initiates this proceeding to:
(1) adopt new application forms for operating authority; (2) award
blanket incidental property authority to all successful applicants;
and (3) award incidental irregular-route passenger authority to
successful regular-route applicants.

I. PROMULGATION OF REVISED APPLICATION FORM

Pursuant to Commission Regulation No. 54-02, the Commission has
revised the application form carriers must use to: (1) obtain
temporary authority; (2) obtain, amend or transfer a certificate of
authority; and (3) transfer control over a carrier or a carrier's
assets or operations.

The current form was last revised in 1992. It requires
applicants to provide information the Commission has determined is
unnecessary to a determination of fitness and consistency with the
public interest under the Compact. The new form reflects the
Commission's findings and is designed to be user-friendly. In
addition, information relevant to transfer proceedings and requested
by Commission order in the past is now expressly covered by the new
form.

The new form will be published in two versions: regular-route
and irregular-route. The old form was designed for use by regular-
route and irregular-route carriers alike. The Commission will accept
applications filed on the old form until July 31, 1998. After that
date all applicants must use the new form.

II. AWARD OF INCIDENTAL AUTHORITY

In conjunction with the promulgation of a new application form,
the Commission is revising its practice regarding the award of
incidental property authority and incidental irregular-route passenger
authority.

A. Incidental Property Authority

1. Background

The Compact provides that a "certificate for the transportation of passengers may include authority to transport newspapers, passenger baggage, express, or mail in the same vehicle, or to transport passenger baggage in a separate vehicle." This provision is a carryover from the original Compact, signed into law in 1960.¹ The original provision read as follows: "A certificate for the transportation of passengers may include authority to transport in the same vehicle with the passengers, newspapers, baggage of passengers, express, or mail, or to transport baggage of passengers in a separate vehicle."² While the sentence structure of this provision was slightly modified in 1990, the amended version is substantively the same.

The original Compact version was borrowed verbatim from section 208(d) of the Motor Carrier Act of 1935.³ Several Compact provisions were modeled after the 1935 Act.⁴ No doubt the framers believed this would complement the transfer of the Interstate Commerce Commission's (ICC's) Metropolitan DC jurisdiction to WMATC.⁵ The ICC's interpretation of section 208(d), while not binding,⁶ guides our construction of the parallel provision in the Compact,⁷ as it must have informed the framers.

2. ICC Precedent

a. Baggage

¹ Act of Sept. 15, 1960, Pub. L. No. 86-794, § 1, 74 Stat. 1031 (1960) [Original Compact].

² Original Compact, tit. II, art. XII, § 4(d)(2).

³ Compare id. with 49 U.S.C.A. § 308(d) (1963).

⁴ Compare Original Compact, tit. II, art. XII, §§ 1(a)(3), 2(e), 4(b) (proviso) with 49 U.S.C.A. §§ 303(b)(1), 303(a)(1), 308(a) (proviso) (1963) (school buses, definition of person and equipment additions, respectively); see In re Title II, Art. XII, § 1(c) of the Compact, No. MP-83-01, Order No. 2407 (Apr. 20, 1983) (bona fide taxicab service).

⁵ See Original Compact, tit. II, art. XII, §§ 21-23 (transferring ICC jurisdiction); 74 Stat. at 1050 (same).

⁶ Alexandria, Barcroft & Wash. Transit Co. v. WMATC, 323 F.2d 777, 779-80 (4th Cir. 1963); In re Executive Limo. Serv., Inc., No. 262, Order No. 1343 (July 25, 1974).

⁷ Alexandria, Barcroft, 323 F.2d at 779-80; see WMA Transit Co. v. Owens, No. 38, Order No. 321 at 5 (Oct. 22, 1963) (adopting ICC interpretation of parallel section).

Shortly after enactment of the Motor Carrier Act, the ICC concluded that transporting baggage was such an integral part of transporting passengers by motor vehicle that it would award baggage authority to applicants for passenger authority even if baggage authority was not requested.

Although the application does not include a request for authority to transport passengers' baggage, the authority to transport passengers should also include the transportation of their baggage since such transportation is necessarily an integral part of the movement of passengers from one point to another. Any authority which may be granted under the considered application will therefore include authority for the transportation of baggage of passengers.⁸

While primarily an application for regular-route authority, the Wayne Auto. application included an express request for special and chartered authority,⁹ and incidental authority to transport special and chartered parties was expressly granted thereunder.¹⁰ It seems clear from the language quoted above, that the authority to transport baggage extended to such operations.

b. Mail

The ICC's construction of its power to authorize transportation of mail in the same vehicles as passengers proceeded down two paths that led essentially to the same destination.

In one line of cases, the ICC routinely approved requests to transport mail in the same vehicles as passengers, holding that "transportation of mail is a service in the public interest customarily afforded by common carriers of passengers, which . . . may [be] authorize[d] in the absence of valid reasons for withholding

⁸ Wayne Auto. Transp. Co., Common Carrier Application, 13 M.C.C. 689, 690 (1939). See also Maguire & Maguire - Control of Gettysburg-Harrisburg Transp. Co., 45 M.C.C. 359 (1947) (transportation of baggage "necessary and integral part" of movement of passengers) (citing Wayne Auto.); but see Homer D. Kirk Common Carrier Application, 24 M.C.C. 431 (1940) (authority to transport baggage in attached trailer denied where no showing of need). Similarly, under common law, "the usual contract of a carrier of passengers included an undertaking to receive and transport their baggage though nothing was said about it." Humphreys v. Perry, 148 U.S. 627, 644 (1893).

⁹ 13 M.C.C. at 689.

¹⁰ Id. at 690-91.

. . . approval."¹¹ In the ICC's opinion, "the public interest require[d] that all common carriers of passengers by motor vehicle be authorized to transport mail for the Post Office," to the extent desired by the Post Office.¹²

[I]t always will be in the public interest for any common carrier of passengers to be in a position to furnish mail service between points served by it, and . . . authority to do so may be granted as a matter of course upon request therefor in an appropriate proceeding, without a showing of public convenience and necessity, in the absence, as here, of any good reason for contrary action.¹³

In the other line of cases, the ICC held that mail service was not covered by the Motor Carrier Act.¹⁴ This meant that even absent a showing of demand, "no special authorization [was] necessary to permit common or contract carriers by motor vehicle to transport mail in the same vehicle with passengers or property moving in interstate or foreign commerce."¹⁵

The ICC later characterized the first line of cases as mere pro forma grants and reaffirmed its position in the latter line by explaining it had "long treated the transportation of mail by motor carriers of either passengers or property as something special, a matter between the carrier and the Post Office," a matter with which the ICC was not concerned despite the absence of any specific exemption in the Motor Carrier Act and despite an implication to the contrary in section 208(d).¹⁶

¹¹ Maquire & Maquire, 45 M.C.C. at 364.; Tri-State Transit Co. of La., Extension, 29 M.C.C. 381, 393 (1941); Santa Fe Trail Stages, Inc., Common Carrier Application, 21 M.C.C. 725, 729 (1940); Dixie Greyhound Lines, Inc., Extension, 1 M.C.C. 681, 688 (1937); Norfolk Southern Bus Corp. Common Carrier Application, 1 M.C.C. 603, 605 (1937).

¹² Capital Motor Lines, Common Carrier Application, 1 M.C.C. 462, 464 (1937).

¹³ Liederbach Bus Co., Common Carrier Application, 1 M.C.C. 776, 777 (1937); see Kirk, 24 M.C.C. at 433 (transportation of mail may be authorized without any specific showing).

¹⁴ Atchison, Topeka & Santa Fe Ry., Extension, 3 M.C.C. 694, 697 (1937).

¹⁵ Teche Lines, Inc., Extension, 7 M.C.C. 285, 286 (1938); Conda G. Lashley, Extension, 7 M.C.C. 53, 54 (1938); Albert Lee Nye, Extension, 6 M.C.C. 661, 662 (1938); Atchison, Topeka & Santa Fe Ry., 3 M.C.C. at 697.

¹⁶ William Blau Common Carrier Application, 61 M.C.C. 705, 707 (1953).

c. Newspapers & Express

Applications for ICC authority to transport newspapers and express in the same vehicles as passengers were usually granted on a minimum of proof.¹⁷ Because a passenger carrier's primary duty was to its passengers, the transportation of property such as newspapers and express was subordinate to their interests.¹⁸ Shipments were limited to those which could be "transported without disturbing the comfort and convenience of passengers or interfering with the safety, speed, and other essential qualities of the common carrier passenger service."¹⁹ This limitation assured good passenger service and prevented "passenger carriers, generally, from going into direct and aggressive competition with common carriers of freight without proof of need for their services."²⁰

3. Conclusion

Congress eventually eliminated the ICC's discretion under section 208(d) by passing the Bus Regulatory Reform Act of 1982 (Bus Act).²¹ After the Bus Act, section 208(d) granted blanket incidental property authority to all passenger carriers as follows: "A certificate of a motor common carrier to transport passengers shall be deemed to include permissive authority to transport newspapers, baggage of passengers, express packages, or mail in the same motor vehicle with the passengers, or baggage of passengers in a separate motor vehicle."²² The amendment to section 208(d) complemented the Bus Act's elimination of "public convenience and necessity" as a determining factor in passenger carrier applications under the Motor Carrier Act.²³

Eight years later, Congress and the signatories likewise eased the entry standard for WMATC carriers by substituting a public

¹⁷ Lakeland Bus Lines, Inc., Common Carrier Application, 74 M.C.C. 737, 739 (1958); see Maguire & Maguire, 45 M.C.C. at 364 (newspaper and express authority grounded on showing of occasional need); Tri-State Transit Co., 29 M.C.C. at 393 (newspaper and express authority grounded on showing of convenience).

¹⁸ Continental Southern Lines, Inc., Extension, 88 M.C.C. 547, 550 (1961).

¹⁹ Id. at 549.

²⁰ Id. at 550.

²¹ Pub. L. No. 97-261, 96 Stat. 1102 (1982).

²² 49 U.S.C. §10922(e)(4) (1983).

²³ See In re Application for Operating Authority - Motor Passenger Carriers, 47 Fed. Reg. 53260 (Nov. 24, 1982) (discussing Bus Act's elimination of public convenience and necessity standard).

interest test for the public convenience and necessity test,²⁴ but where the Bus Act removed the ICC's incidental property discretion at the national level, the 1990 Compact amendments preserved the Commission's incidental property discretion at the regional level. Exercising that discretion on a case-by-case basis, however, is no longer necessary.

As our review of pertinent ICC precedent reveals, prior to 1990 ICC applicants who demonstrated a public need for passenger transportation and fitness to provide that transportation were automatically eligible for incidental baggage and mail authority. Requests for incidental newspaper and express authority were granted on a minimal showing of need. With that precedent in mind and considering that WMATC applicants are no longer required to make a public convenience and necessity showing, we conclude that under the amended Compact, WMATC applicants are automatically eligible for incidental property authority upon a finding of fitness to transport passengers. Accordingly, under article XI, section 9(d), each certificate of authority is hereby deemed to include the full measure of authority permitted under section 9(d). This decision applies to existing certificates, as well as those not yet issued.

We take this action pursuant to article XI, section 7(d), which empowers us to "attach to the issuance of a certificate and to the exercise of the rights granted under it any term, condition, or limitation that is consistent with the public interest."²⁵ Deeming each certificate of authority to include blanket incidental property authority is consistent with the public interest. It simplifies the application process²⁶ and places all WMATC carriers on the same competitive footing. Simplifying the application process and promoting competition are among the amended Compact's goals.²⁷

The Compact's mandate that each carrier "provide safe and adequate transportation service" may in certain situations necessitate

²⁴ Consent to Wash. Metro. Area Transit Reg. Compact, H.R. Rep. No. 101-504, 101st Cong., 2d Sess. 11 (1990); 136 CONG. REC. 12,646 (1990) (statement of Rep. Brooks); In re Washington Shuttle, Inc., t/a Supershuttle, No. AP-96-13, Order No. 4996 at 3-4 (Jan. 8, 1997).

²⁵ Cf., Chicago, St. Paul, Minn., & Omaha Ry. v. United States, 322 U.S. 1 (1944) (power to attach conditions to ICC certificate permits award of authority greater than requested); Wayne Auto., 13 M.C.C. at 690 (baggage authority awarded even though not requested).

²⁶ In the past, some applicants that clearly should have anticipated customer requests to transport baggage nevertheless failed to request such authority, resulting in additional paperwork for the applicant and the Commission when the Commission requested separate confirmation. E.g., In re Double Decker Bus Tours, W.D.C., Inc., No. AP-95-21, Order No. 4567 (Apr. 11, 1995).

²⁷ Order No. 4996 at 4.

the transportation of baggage; otherwise, the award of blanket incidental property authority in and of itself should not be construed as imposing any obligation to provide incidental property transportation.

To the extent willingly provided, the transportation of newspapers, express, or mail in the same vehicle as passengers must be subordinate to the interests of passengers.²⁸ Baggage need not be checked. Unchecked baggage is considered to be "in the custody of the passenger and no responsibility with respect thereto is imposed on the carrier."²⁹ Baggage willingly checked by the carrier becomes the responsibility of the carrier under the Compact's aforementioned "safe and adequate transportation service" mandate.

B. Incidental Irregular-Route Authority

The Compact provides that when an application for a certificate of authority is made, the Commission shall issue a certificate to any qualified applicant, authorizing all or any part of the transportation covered by the application, if it finds that the proposed transportation is consistent with the public interest and that the applicant is fit, willing, and able to perform the proposed transportation properly, conform to the provisions of the Compact, and conform to the rules, regulations, and requirements of the Commission. The Compact also provides that the Commission may attach to the issuance of a certificate and to the exercise of the rights granted under it any term, condition, or limitation that is consistent with the public interest. The power to attach "terms, conditions, and limitations" to the exercise of authority under a motor carrier certificate includes the power to grant authority "greater than the carrier had asked."³⁰

Since the Compact was amended in 1990, the Commission has entertained two applications for regular-route authority -- neither of which proceeded past the preliminary stages.³¹ In both proceedings the Commission required that the applicants make a far greater showing of

²⁸ See supra, § II.A.3. (discussing newspapers and express); Capital Motor Lines, 1 M.C.C. at 464 (discussing mail).

²⁹ Marietta Neece v. Richmond Greyhound Lines, 99 S.E.2d 756, 762 (1957).

³⁰ Chicago, St. Paul, Minn., & Omaha Ry. v. United States, 322 U.S. 1, 4 (1944).

³¹ In re Washington, D.C. Jitney Ass'n, Inc., No. AP-95-26, Order No. 4795 (Mar. 15, 1996) (dismissing application without prejudice); In re MTS-Mouling Transp. Sys., Inc., No. AP-92-30, Order No. 4087 (Apr. 20, 1993) (same).

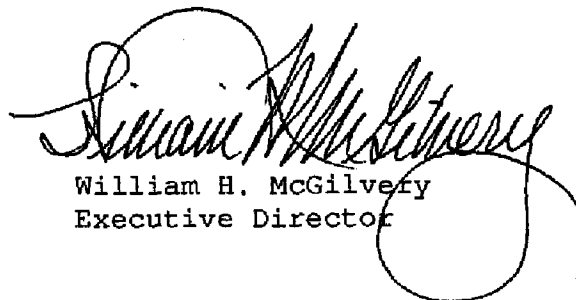
fitness than that required of irregular-route applicants.³² The requirement of a greater fitness showing stems from the Compact's special emphasis on preserving the dependability of regular-route service.³³ Given the greater fitness showing required of regular-route applicants, it follows that a finding of fitness to perform regular-route service will also sustain a finding of fitness to perform irregular-route service.

Granting incidental irregular-route authority to successful regular-route applicants is consistent with the public interest for the following reasons. First, it enhances the opportunities for earning additional profits that can be used for maintaining, repairing and replacing equipment and for sustaining unprofitable routes. Second, it encourages full use of existing capacity, which makes sense from a resource allocation perspective. Finally, it conserves the resources of carriers and the Commission by avoiding subsequent amendment proceedings when the advantages of possessing irregular-route authority become apparent to regular-route certificate holders.

As with incidental property authority, an award of incidental irregular-route authority will carry with it no obligation for providing such service beyond that assumed in a carrier's tariff.

IT IS SO ORDERED.

BY DIRECTION OF THE COMMISSION; COMMISSIONERS ALEXANDER, LIGON, AND MILLER:



William H. McGilvery
Executive Director

³² See In re Washington, D.C. Jitney Ass'n, Inc., No. AP-95-26, Order No. 4665 (Sept. 12, 1995) (applicant directed to file cash flow statement and business plan); In re MTS-Mouling Transp. Sys., Inc., No. AP-92-30, Order No. 4044 (Jan. 26, 1993) (same). Occasionally, an irregular-route applicant will be asked to file a cash flow statement, but no irregular-route applicant has been asked to file a business plan, at least not since the Compact was amended in 1990.

³³ See Compact, tit. II, art. XI, § 12 (prohibiting abandonment of regular-route service without Commission approval).